SUPREME COURT, U. S.

FILED

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1968~~ 1969

No. ____

RANSOM MELVIN KETRON,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

B. C. McINTURFF, Attorney
132 Broad Street
Kingsport, Tennessee
GEORGE H. GARRETT, Attorney
211 Broad Street
Kingsport, Tennessee
Attorneys for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. .....

RANSOM MELVIN KETRON,
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vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner, Ransom Melvin Ketron, prays that a Writ of Certiorari issue to review the judgments of the Court of Criminal Appeals and the Supreme Court of the State of Tennessee, in which the Court of Criminal Appeals affirmed a conviction of Bribery imposed upon the Petitioner in the Criminal Court for Sullivan County, Tennessee, and in which the Supreme Court of the State of Tennessee denied Certiorari.

REFERENCE TO OPINIONS BELOW

The opinions in this case have not been published in book or bound form. There are no unofficial reports published of that opinion. The opinions of the Court are from the files of the Court and appear in the record as follows:

Opinion of the Court of Criminal Appeals of the State of Tennessee, dated March 5, 1969, appears in this record, Volume ....., page ....., et seq., and in the Appendix to this Petition.

The judgment of the Supreme Court of the State of Tennessee denying Petitioner's Petition for Writ of Certiorari, dated May 19, 1969, appears in this record, Volume ....., page ....., et seq.

STATEMENTS OF JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked on grounds that the Petitioner's constitutional rights have been refused recognition by the Court of Criminal Appeals of the State of Tennessee and the Supreme Court of the State of Tennessee in the proceedings which they were reviewing. This jurisdiction of the Supreme Court of the United States is invoked under 28 U. S. C. 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment of the Constitution of the United States

Rights of the Accused.—In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of accusation; to be confronted with

the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment of the Constitution of the United States

Citizenship—Due Process of Law—Equal Protection.—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TENNESSEE STATUTES INVOLVED

Tennessee Code Annotated, Section 40-2402

COMPETENCY OF DEFENDANT—In the trial of all indictments, Presentments, and other Criminal Proceedings, the party Defendant thereto, may, at his own request, but not otherwise, be a competent witness to testify therein.

QUESTIONS PRESENTED FOR REVIEW

I.

Whether the refusal of the Trial Court to grant petitioner a severance from his co-defendant violated petitioner's constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution, in that he was denied his right to have compulsory process for obtaining witnesses in his favor, in view of Tennessee Code Annotated Section 40-2402 which provides that in the trial of all indictments, presentments and other criminal

proceedings the party defendant thereto may, at his own request but not otherwise, be a competent witness to testify therein?

PETITIONER ANSWERS: YES.

The aforementioned action on the part of the State of Tennessee denied the petitioner his constitutional right to have compulsory process for obtaining witnesses in his favor.

See U. S. Const. Amends. 14 and 6; *Washington* v. *Texas*, 388 U.S. 14, 18 L.Ed.2d 1019, 87 S.Ct. 1920 (1967).

II.

Whether the Trial Court violated Your Petitioner's Constitutional rights under the Due Process provisions of the Sixth and Fourteenth Amendments to the United States Constitution and the Petitioner's right of trial by jury guaranteed to him under the Sixth Amendment to the United States Constitution when the Trial Court decided in the first instance that the factual issues concerning the applicability of the doctrine of entrapment were to be determined by him and not the jury?

PETITIONER ANSWERS: YES.

The Trial Court's action in determining whether the doctrine of entrapment was applicable in Petitioner's case was error and that issue should have been submitted to the jury as part of its function of determining the guilt or innocence of the accused

See: U. S. Const. Amends. 14 and 6;

Parker v. *Gladden*, 385 U.S. 363, 17 L.Ed.2d 420, 87 S.Ct. 468 (1966);

Duncan v. *Louisiana*, 391 U.S. 145, 20 L.Ed.2d 491, 88 S.Ct. 1444, Reh. Den. 392 U.S. 947, 20 L.Ed.2d 1412, 88 S.Ct. 2270 (1968);

Bloom v. *Illinois*, 391 U.S. 194, 20 L.Ed.2d 522, 88 S.Ct. 477;

Lopez v. *United States*, 373 U.S. 427, 10 L.Ed.2d 462, 83 S.Ct. 1381;

Sherman v. *United States*, 356 U.S. 369, 2 L.Ed.2d 848, 78 S.Ct. 819;

Masciale v. *United States*, 356 U.S. 386, 2 L.Ed.2d 859, 78 S.Ct. 827, Reh. Den. 357 U.S. 933, 2 L.Ed.2d 1375, 78 S.Ct. 1367.

III.

Whether the Trial Court violated your Petitioner's constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution when the Trial Court refused to charge the law applicable to the doctrine of entrapment and the exceptions thereto?

PETITIONER ANSWERS: YES.

The aforementioned action on the part of the Trial Court denied the Petitioner his constitutional rights under the due process provisions of both the Sixth and Fourteenth Amendments to the United States Constitution and his rights of trial by jury secured to him under the Sixth Amendment to the United States Constitution. See (U. S. Constitution Amendments 14 and 6; *Parker* v. *Gladden*, 385 U.S. 363, 17 L.Ed.2d 420, 87 S.Ct. 468 (1966).)

STATEMENT OF THE CASE

The Petitioner, Ransom Melvin Ketron, and one Otis Lee Collier, were indicted on the charge of Bribery of A. M. Brown, a Deputy Sheriff of the Sullivan County, Tennessee, Sheriff's Department, on July 6, 1967.

It was alleged that the Petitioner first approached Deputy Brown and requested Deputy Brown to work out

some arrangement whereby a charge pending against Otis Lee Collier for possessing and selling legend drugs could be worked out, so that Collier could get his job back. After this initial meeting between the Petitioner and Deputy Brown, Deputy Brown procured a tape recording device and placed it in the trunk of his automobile, along with another officer, and proceeded to Petitioner's home. After a short conversation in Deputy Brown's automobile Petitioner and his Co-Defendant allegedly gave Deputy Brown one hundred dollars each to take care of the pending legend drug case against Collier. Following the transfer of the money Petitioner and his Co-Defendant were arrested and subsequently indicted for bribery.

STATEMENT OF FACTS MATERIAL FOR CONSIDERATION OF QUESTION No. 1

The Petitioner along with his Co-Defendant were put to trial on the indictment charging bribery before the Honorable John K. Byers, Judge of the Criminal Court for Sullivan County, at Blountville, Tennessee, on the 20th day of November, 1967. After the jury was selected and accepted the Petitioner's Attorney moved for a severance from his Co-Defendant, said motion being overruled by the Trial Court and the Petitioner's Attorney saved exceptions to the Court's action in overruling his motion for a severance. See (Bill of Exceptions pages 1-2); (Appendix pages A6-A7).

The Petitioner filed a motion for a new trial before the Honorable John K. Byers, Judge of the Criminal Court for Sullivan County, at Blountville, Tennessee, on the 29th day of November, 1967, alleging as one of his grounds for a new trial, the fact that the Trial Court erred in failing to grant him a severance from his Co-Defendant. See (Technical Record pages 11-12).

The motion for a new trial was overruled by the Trial Court on the 31st day of January, 1968. See (Technical Record page 15).

The Petitioner appealed his conviction to the Tennessee Court of Criminal Appeals at Knoxville, Tennessee. The Petitioner assigned as one of his Assignments of Error the fact that the Court erred in overruling his motion to sever his case from that of the Defendant Collier and grant him a separate trial. Petitioner alleging in his Brief before the Court of Criminal Appeals that the action of the Trial Court in overruling his motion for a severance deprived the Petitioner of the right to call his Co-Defendant as a witness in his own behalf and this was a denial of his constitutional rights. See (Petitioner's Brief to the Tennessee Criminal Court of Appeals, Assignment of Error No. 2, pages 7-9).

The Court of Criminal Appeals of Tennessee filed its opinion on March 5, 1969, said Court affirming the judgment of the Trial Court. See (Opinion of the Court of Criminal Appeals of Tennessee, Appendix page A1).

The Court of Criminal Appeals of Tennessee held, on the refusal of the Trial Court to grant a severance as follows: "The remaining assignment of error is to the action of the Trial Judge in overruling Ketron's motion for a severance." It is not shown in the record how the defendants were prejudiced by being tried together. The question of the granting or refusing to grant a severance is a matter of discretion with the Trial Court and unless that discretion is abused the action of the Trial Court will not be disturbed on appeal. (See Opinion of Court of Criminal Appeals of Tennessee, Appendix page A4).

The Petitioner filed on March 7, 1969, a Petition for Writ of Certiorari and Assignments of Error and Brief to

the Supreme Court of the State of Tennessee. Petitioner later filed, within the time allowed by law, an amended and/or supplemental petition for Writ of Certiorari and Assignments of Error and Brief with the Supreme Court of the State of Tennessee. Petitioner alleged in his Petition for Writ of Certiorari and Brief that the refusal of the Trial Judge to grant him a severance from his Co-Defendant in and of itself was an abuse of discretion and was in direct violation of the Defendant's constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution, the Petitioner also alleging that the Criminal Court of Appeals erred in affirming this issue presented to it. See (Amended and/or Supplemental Petition for Writ of Certiorari and Assignments of Error and Brief to the Supreme Court of Tennessee, pages 2-10).

The Petitioner contending in his petition and brief before the Supreme Court of the State of Tennessee that the refusal of the Trial Court to grant him a severance forced him to be tried jointly with his Co-Defendant and deprived him, as a matter of law, from calling his Co-Defendant as a witness in his own behalf, the Co-Defendant being immuned from being called to the stand under the protection of Tennessee Code Annotated, Section 40-2402, and as a result the Petitioner was deprived of his constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution.

The Supreme Court of the State of Tennessee denied Petitioner's Writ of Certiorari, without oral arguments on the 19th day of May, 1969.

The Supreme Court of the State of Tennessee denied said Writ without a written opinion being published by the Court.

STATEMENT OF FACTS MATERIAL FOR CONSIDERATION OF QUESTION No. II

During the second day of Petitioner's trial Petitioner's Attorney and his Co-Defendant's Attorney were making their closing arguments to the jury. Petitioner's Attorney and his Co-Defendant's Attorney attempted to argue the doctrine of entrapment to the jury. The Trial Court held, in the presence of the jury, that the doctrine of entrapment was not applicable in their case. The Petitioner's Attorney and the Co-Defendant's Attorney saved exceptions to the Court's ruling. See (Bill of Exceptions 196-197 and 200-201). (Appendix pages A7-A9).

Petitioner raised, in his motion for a new trial, that the Court erred in charging the law applicable to the doctrine of entrapment and that the Court's comments and action concerning the law of entrapment prejudiced the Defendant and destroyed his theory of the case. See (Technical Record, pages 11-12).

In Petitioner's Brief to the Court of Criminal Appeals of Tennessee Petitioner's Attorney assigned as error that the Trial Judge erred in deciding the doctrine of entrapment did not apply and it was error for the Court to decide said issue, it being for the determination of the jury. See (Petitioner's brief to the Court of Criminal Appeals of Tennessee pages 9-13).

The Court of Criminal Appeals of Tennessee held as follows on this issue: "It is the Defendants' theory that they were enticed or entrapped to commit the crime by Officer Brown and for this reason the evidence obtained should not be admitted. Even if the doctrine of entrapment was recognized in Tennessee, this would not constitute such a case. According to the uncontradicted proof, the idea for paying Officer Brown originated with Ketron,

and was acquiesced in by Collier, with only passive encouragement from the officer. As pointed out in *Goines, et al.* v. *State*, 192 Tenn. 32, citing annotations in 86 A. L. R. 264, ". . . if the criminal intent originates in the mind of the accused, the fact that an opportunity is furnished, or that the accused is aided in the commission of the crime in order to secure the evidence necessary to prosecute him therefor, constitutes no defense."

"The assignments of error as to the sufficiency and the admissibility of the evidence and to the failure of the trial court to instruct the jury on the matter of entrapment are overruled." See (Opinion of Criminal Court of Appeals of Tennessee, pages 2-3). (Appendix pages A3-A4).

In Petitioner's Petition for Writ of Certiorari and Brief Petitioner alleged that the Court of Criminal Appeals erred in affirming the issue presented to it and assigned as error; that the action on the part of the Trial Court denied Petitioner his rights under the due process provisions of the United States Constitution. See (Amended and/or Supplemental Petition for Writ of Certiorari and Assignments of Error and Brief to the Supreme Court of Tennessee, pages 18-25).

The Supreme Court of Tennessee denied petitioner's Writ without a written opinion being published.

STATEMENT OF FACTS MATERIAL FOR CONSIDERATION OF QUESTION No. III

Petitioner's Attorney submitted special requests to the Court dealing with a charge on the doctrine of entrapment. (Technical Record 7).

The Trial Court refused to charge the special requests and noted his reasons for not charging same on the original forms submitted to him. (Technical Record 7).

The Petitioner raised this issue on the motion for a new trial. (Technical Record 11-12).

The motion for new trial was overruled by the Trial Court. (Technical Record 15).

The Petitioner raised this issue in his Brief before the Tennessee Court of Criminal Appeals. See (Brief to the Court of Criminal Appeals pages 13-15)

The Tennessee Court of Criminal Appeals affirmed this issue presented to it. See (Opinion of Court of Criminal Appeals of Tennessee). (Appendix pages A1-A4).

Petitioner raised this issue before the Supreme Court of Tennessee in his petition for Writ of Certiorari and Assignments of Error and Brief and his Amended and/or Supplemental Petition for Writ of Certiorari and Assignments of Error and Brief. See (Amended and/or Supplemental Petition for Writ of Certiorari and Assignments of Error and Brief pages 14-25).

The Supreme Court of the State of Tennessee denied Petitioner's Writ without a written opinion being filed.

ARGUMENT AND REASONS FOR ALLOWANCE OF WRIT

Question No. I

The Petitioner contends that the Court of Criminal Appeals and the Supreme Court of the State of Tennessee, in affirming Petitioner's judgment have decided his case in such a manner as to be repugnant to the Sixth and Fourteenth Amendments to the United States Constitution and repugnant to this Honorable Court's Ruling in the case of *Washington* v. *Texas,* 388 U.S. 14, 18 L.Ed.2d 1019, 87 S.Ct. 1920 (1967), and that there are special and important reasons for granting his writ of certiorari and for the grounds would show to this Honorable Court the following:

The Petitioner contends that he has the Constitutional right to have compulsory process for obtaining witnesses in his favor and that this right is secured to him by the Sixth Amendment to the United States Constitution as made applicable to the States through the Due Process Clause of the Fourteenth Amendment. The Petitioner contends that the right of an accused to offer his witnesses during the trial and to compel, if necessary, their attendance goes to the very essence of a fair trial. That in order for an accused to establish a defense to a charge he must be afforded some procedure in which he can place before the jury the true facts of the case in order that they may reach a proper decision of the case. The Petitioner contends that the State of Tennessee has deprived him of this constitutional safeguard and will in the future deprive others of the same protection.

The Constitution of the United States through the Sixth and Fourteenth Amendments has given the Petitioner the basic right to have compulsory process for obtaining witnesses in his favor and the State of Tennessee has arbitrarily denied the Petitioner this right by denying his motion for a severance and requiring him to be tried jointly with his Co-Defendant.

The effect of the Court's ruling requiring the Petitioner to be tried jointly with his Co-Defendant was to prevent the Petitioner as a matter of law from calling his Co-Defendant to the witness stand in his own behalf. The Co-Defendant being immuned from being called to the stand under the protection of Tennessee Code Annotated, Section 40-2402, which provides that "In the trial of all indictments, presentments, and other criminal proceedings, the party defendant thereto may, as his own request, but not otherwise, be a competent witness to testify therein."

It can hardly be argued that the State of Tennessee does not violate the command of the Sixth Amendment

when it makes the Co-Defendant's testimony inadmissible as a matter of procedural law unless he elects to waive this procedural safeguard and takes the stand to testify.

ARGUMENT AND REASONS FOR ALLOWANCE OF WRIT

Question No. II

The Petitioner contends that the Court of Criminal Appeals and the Supreme Court of the State of Tennessee, in affirming Petitioner's judgment have decided his case in such a manner as to be repugnant to the Due Process provisions of the Sixth and Fourteenth Amendments to the United States Constitution and repugnant to Petitioner's right of trial by jury guaranteed to him under the Sixth Amendment to the United States Constitution. The Petitioner contends that the factual issues concerning the applicability of the doctrine of entrapment should be determined by the jury and not by the Trial Judge. The Trial Judge may well have thought that the evidence on the issue of entrapment was weak but weighing the evidence is a function of the jury not of the Trial Judge. If this rule was followed to its logical conclusion the Trial Judge could conceivably rule, in a case involving the defense of self defense, that the Defendant had failed to carry the burden on that issue, and the Trial Court proceed to make a determination itself, without the assistance of the jury on that issue.

The Petitioner contends that the right to trial by jury is among those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and that for the Trial Judge to take upon itself the burden of weighing the evidence on the issue of the applicability of the doctrine of entrapment deprived petitioner of his right to a trial by jury, secured to him under the Constitution of the United States.

"Our law has therefore wisely placed this strong and two-fold barrier of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown. It was necessary for preserving the admirable balance of our constitution, to vest the executive power of the laws in the prince; and yet this power might be dangerous and destructive to that very constitution, if exerted without check or control, by justices of oyer and terminer occasionally named by the crown; who, might, then, as in France or Turkey imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure. But the founders of the English law, have, with excellent forecast, contrived that . . . the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen and superior to all suspicion." *Duncan* v. *Louisiana,* 391 U.S. 145, 20 L.Ed.2d 491, 88 S.Ct. 1444, 20 L.Ed.2d. at page 487.

ARGUMENT AND REASONS FOR ALLOWANCE OF WRIT

Question No. III

The Petitioner contends that the Court of Criminal Appeals and the Supreme Court of the State of Tennessee, in affirming Petitioner's judgment have decided his case in such a manner as to be repugnant to the Due Process Provisions of the Sixth and Fourteenth Amendments to the United States Constitution and denied Petitioner's right of trial by jury under the Sixth Amendment to the United States Constitution and in support thereof would show to this Honorable Court the following:

The Petitioner's Attorney submitted special request dealing with a charge directing itself to the doctrine of

entrapment. The Court overruled this special request and ruled that the request was being refused and holding that it was not applicable in this case as to law or fact.

The Petitioner was charged with Bribery of a Police Officer and his entire theory and defense was that Deputy A. M. Brown of the Sullivan County Sheriff's Department instigated, induced and lured him into the commission of this crime for the sole purpose of prosecuting him. The record shows that Deputy Brown has had extensive experience in the field of under-cover operations, with both the State and Federal Agencies. The record shows that Deputy Brown had been associating with the Petitioner on a personal basis, for quite some time prior to the alleged commission of the Bribery. There was positive testimony during the course of the trial which is uncontradicted by Deputy Brown, that just prior to the Petitioner's arrest Deputy Brown had visited the Petitioner's home on several occasions and was seen drinking with the Petitioner.

It is further emphasized that the Petitioner's theory and defense of this charge was that he was in fact, during this period of time, being induced and lured and entrapped by Deputy Brown into the commission of the alleged offense of Bribery.

Petitioner's defense was that Deputy Brown on numerous occasions had visited with Petitioner in his home and had socialized with him prior to the alleged offer of a bribe and that the jury should have been entitled to, under a correct charge from the Court, weigh this evidence along with all the other evidence in the case to arrive at their verdict.

The refusal of the Trial Court to charge the law in relation to the defense of entrapment totally destroyed the Petitioner's defense and prejudiced the Defendant to such an extent that it totally destroyed his case, and was in ef-

fect the same as telling the jury that they were to either find the Petitioner guilty of Bribery or acquit him for there was no defense to such a charge.

The Petitioner submits that a charge is proper when taken altogether fairly states the law to the jury and fairly presents the theories of both the Defendant and the State without leading emphasis to facts or of singling out of witnesses, the charge should be full and fair to both parties.

The action on the part of the Trial Court did not fairly state the law to the jury. The Petitioner submits that the State's theory was presented to the jury but the Petitioner's theory was totally taken from him by the action of the Trial Court in failing to give the jury a charge on the law of entrapment. The charge was not full and fair to both parties and as a result deprived the Petitioner of his constitutional rights under the due process and right to jury provisions of the Sixth and Fourteenth Amendments to the United States Constitution.

CONCLUSIÓN

That the Writ of Certiorari be granted and this cause be moved to this Honorable Court to the end that the error, wrongs, and injury committed by the State of Tennessee be corrected.

Respectfully submitted,

B. C. McINTURFF, Attorney
132 Broad Street
Kingsport, Tennessee

GEORGE H. GARRETT, Attorney
211 Broad Street
Kingsport, Tennessee

APPENDIX

A. OPINION OF THE COURT OF CRIMINAL APPEALS OF TENNESSEE

THE COURT OF CRIMINAL APPEALS OF TENNESSEE
KNOXVILLE

APPEAL IN ERROR FROM THE CRIMINAL COURT
OF SULLIVAN COUNTY

HONORABLE JOHN K. BYERS, JUDGE

RANSOM MELVIN KETRON and OTIS LEE COLLIER,
Plaintiffs in Error
vs.
STATE OF TENNESSEE,
Defendant in Error
} Sullivan County

FOR PLAINTIFFS IN ERROR: Burkett C. McInturff, S. G. Gilbreath, Kingsport, Tennessee.

FOR DEFENDANT IN ERROR: George F. McCanless, Attorney General, Nashville, Tennessee. Robert F. Hedgepath, Assistant Attorney General, Nashville, Tennessee. Carl K. Kirkpatrick, Jr., District Attorney General, Blountville, Tennessee.

JUDGMENT AFFIRMED
OPINION BY JUDGE CHARLES GALBREATH

FILED: March 5, 1969

Opinion

The plaintiffs in error, Ransom Ketron and Otis Collier, were each sentenced to serve two and one-half years in the Penitentiary having been convicted in the Criminal Court of Sullivan County for bribery of a peace officer in violation of § 39-803 T.C.A., and appeal from the action of the trial judge in overruling their motion for a new trial.

Otis Collier, at the time of the circumstances giving rise to the convictions in the case, had previously been arrested and charged in connection with dealing in legend drugs, or as referred to in the record, he had a "pill case" pending against him. According to the State's proof, which is generally uncontradicted, Ketron contacted a deputy sheriff of Sullivan County who had worked on the "pill case", one Athan (Buster) Brown, and offered to pay him $100.00 to use his influence with the judge of the Court in which his case was pending, or the prosecuting witness, and get the case "throwed out or dismissed." A few days later, the defendant Ketron approached the deputy again and raised the offer to $200.00 and asked him to meet with him and the other plaintiff in error, Otis Collier, that night.

The officer reported the conversations to the General Sessions Judge and as a result was referred to the Attorney General and apparently with the advice and cooperation of that official procured a tape recorder, which he conealed in the trunk of an automobile together with another officer and proceeded to keep his rendevous with the defendants. Picking up both defendants at their respective homes, the officer drove to a point half way between their houses in the Long Island Community and parked. A lengthy conversation occurred between the defendants and Deputy Brown, during which he warned them what would happen if they were caught bribing an officer. After assuring the officer that they would never tell, the two defendants gave him one hundred dollars in cash, supplied by Collier, and a check in like amount drawn on Ketron's account at the 1st National Bank at Kingsport. After consummating the transaction, Officer Brown drove his car to a point on the Greeneville Highway where a police car was waiting and the defendants were placed under arrest, after the secret witness in the automobile's

trunk was let out. The defendants were surprised by their predicament and expressed themselves rather strongly on the subject. They were advised of their constitutional rights and transported to Kingsport where they arranged bond.

The first series of assignments of error go to the sufficiency of the evidence. The evidence in the record, if admissible, was overwhelming as to guilt. It is the defendants' theory that they were enticed or entrapped to commit the crime by Officer Brown and for this reason the evidence obtained should not be admitted. Even if the doctrine of entrapment was recognized in Tennessee, this would not constitute such a case. According to the uncontradicted proof, the idea for paying Officer Brown originated with Ketron, and was acquiesced in by Collier, with only passive encouragement from the officer. As pointed out in *Goines, et al.* v. *State*, 192 Tenn. 32, citing annotations in 86 A.L.R. 264, ". . . if the criminal intent originates in the mind of the accused, the fact that an opportunity is furnished, or that the accused is aided in the commission of the crime in order to secure the evidence necessary to prosecute him therefor, constitutes no defense."

The assignments of error as to the sufficiency and the admissibility of the evidence and to the failure of the trial court to instruct the jury on the matter of entrapment are overruled. The complaint raised as to evidence obtained by use of the tape recorder concealed in the automobile is not justified. The court ruled that the recording of the conversation between the two defendants and Officer Brown was inadmissible because the poor quality of the sound made it difficult to understand and confusing. He did allow the witness to refresh his recollection with notes prepared from the recording and it is not suggested why this would be improper. The conversation itself was admissible and it has long been the practice for officers

to make notes during an investigation in order that their testimony will not be entirely dependent on memory alone. See *Leach* v. *State*, 220 Tenn. 526, 420 S.W. 2d 641.

A number of assignments of error address themselves to the failure of the trial court to specially instruct the jury on four points of law requested on behalf of the defendants. These requested instructions were not preserved in the bill of exceptions and thus this Court cannot consider them for any purpose. See *Wheeler* v. *State*, 220 Tenn. 155 (1967).

An assignment of error not included as a ground in the motions for new trials complained of the failure of the arresting officer to advise the defendants of their constitutional rights as detailed in *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602. Miranda and its related cases dealt with in custody interrogations concerning crimes that had been committed by the suspects. In this case the defendants were not in custody and had not yet committed the crime for which they stand convicted here.

The remaining assignment of error is to the action of the trial judge in overruling Ketron's motion for a severance. It is not shown in the record how the defendants were prejudiced by being tried together. "The question of the granting or refusing to grant severance is a matter of discretion with the Trial Court and unless that discretion is abused the action of the Trial Court will not be disturbed on appeal." *Essary* v. *State*, 210 Tenn. 220.

Finding no error below the judgments are affirmed.

/s/ Charles Galbreath,
Charles Galbreath, Judge

Concur:

/s/ Mark A. Walker
/s/ Illegible
Concur in result.

OFFICE OF CLERK OF COURT OF
CRIMINAL APPEALS

For the Eastern Division of the State of Tennessee

I, JOHN A. PARKER, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the opinion of said Court, pronounced at its December term, 1968, in the case of RANSOM MELVIN KETRON, ET AL against STATE OF TENNESSEE as appears of record now on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Court, at office in Knoxville, on this the 28th day of May, 1969.

s/ John A. Parker
Clerk

By .....

(Seal) D.C.

B. SIXTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

Rights of the Accused.—In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

Citizenship—Due process of law—Equal protection.—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

C. TENNESSEE CODE ANNOTATED, SECTION 40-2402

COMPETENCY OF DEFENDANT—In the trial of all indictments, Presentments, and other Criminal Proceedings, the party Defendant thereto, may, at his own request, but not otherwise, be a competent witness to testify therein.

D. FOR CONSIDERATION OF QUESTION #1

MR. McINTURFF: If Your Honor please, I represent Ransom Ketron. I move for a severance and a separate trial on the subject matter of this charge. The indictment charges Bribery over what we call pills, the indictment charges possession of pills or legend drugs. Ransom Ketron is not charged in the indictment in that case or any other case except the one presently at the bar. Now, I say—in reference to the proof in this case. I say, if Your Honor please, and especially for Ode Collier in the development of this case because of certain proof introduced by the State that took place outside the presence of Ode Collier—all sorts of proof of that nature.

THE COURT: Well, based on the first grounds you state there concerning whether or not Mr. Ketron is under a charge of this Court for any offense, that within itself wouldn't be material the way the charge is laid. It's not essential to the State's case, if a case there be, that a person charged with this offense be under any indictment for any offense. As to the other, they are jointly bribed—or are jointly indicted. The proof will have to be consistent with and material to both Defendants in that respect, or under proper instructions of the Court if it's not.

MR. McINTURFF: I take it Your Honor is overruling the motion?

THE COURT: Yes, overruled.

MR. McINTURFF: Save exceptions.

THE COURT: All right, any other motions now before we select the jury?

MR. FULLER: If Your Honor please, for the purpose of the record, let the record show that the Defendant Collier also makes the same motion and saves exceptions to your ruling.

BILL OF EXCEPTIONS—(1-2)

E. TRIAL COURT'S RULING THAT DOCTRINE OF ENTRAPMENT WAS NOT APPLICABLE TO PETITIONER'S CASE AND EXCEPTIONS THERETO

MR. FULLER: Gentlemen, there is a doctrine in the State of Tennessee known as entrapment, and that is the law . . .

GENERAL KIRKPATRICK: Now, Your Honor, we object.

THE COURT: Sustained.

GENERAL KIRKPATRICK: There is no such theory as entrapment in this state.

MR. FULLER: If your Honor please, if the Court doesn't wish to charge, it can, but I have a right to argue what our theory of the case is.

THE COURT: You can argue your theory of the case as to facts, but not as to law that is not applicable.

MR. FULLER: Well, is the Court holding at this time that he is not going to charge the doctrine of entrapment?

THE COURT: That's correct, the Court is not going to charge entrapment in this case.

MR. FULLER: Well, we respectfully save exceptions to the Court. . .

THE COURT: All right.

MR. FULLER: In not allowing us to argue the Hagemaker case, Hagemaker vs. State of Tennessee.

THE COURT: It's not applicable to this case. (Bill of Exceptions 196-197).

MR. McINTURFF: One who is instigated, induced or lured by an officer of the law or other person for the purpose of prosecution into the commission of a crime which he had otherwise no intention of committing may avail himself of the defense of entrapment. That's the great case of Hagemaker vs. The State. . .

GENERAL KIRKPATRICK: Now, Your Honor, we object to that.

MR. McINTURFF: (Unintelligible).

THE COURT: Sustained, Mr. McInturff.

MR. McINTURFF: If Your Honor please, I want to read—and, I save exceptions to the Court's ruling forbiding me to argue. . .

THE COURT: Save exceptions—you may argue the case. . .

MR. McINTURFF: The Hagemaker case to the Court.

THE COURT: Just a minute, Mr. McInturff. You may argue your case to the jury, but the Court sustains

the objection, because the law that you're reading to the jury is not the law of the State of Tennessee and not the law in this case. (Bill of Exceptions, pp. 200-201).

F. 28 U. S. C. A. 1257

Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State Statute is drawn in question on the ground of its being repugnant to the constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the constitution, treaties or statutes of, or commission held on authority exercised under, the United States.